IN THE

Supreme Court of the United States

October Term, 1962.

No. 142.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL, M. EDWARD NORTHAM, and CHARLES H. BOEHM, Superintendent of Public Instruction, Commonwealth of Pennsylvania,

Appellants,

v.

EDWARD LEWIS SCHEMPP, SIDNEY GERBER SCHEMPP, Individually and as Parents and Natural Guardians of ROGER WADE SCHEMPP and DONNA KAY SCHEMPP,

Appellees.

BRIEF FOR APPELLEES.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

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v.

EDWARD LEWIS SCHEMPP, SIDNEY GERBER SCHEMPP, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF ROGER WADE SCHEMPP AND DONNA KAY SCHEMPP,

Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE.

(a) Jurisdictional Statement.

Appellees are the Schempp family—husband and wife and two minor children. By their complaint they sought a preliminary injunction, and a permanent injunction after trial, enjoining the ceremonial reading of the King James Version of The Bible and recitation, in ceremonial unison, of the Lord's Prayer in the Schools of Abington Township,

Montgomery County, Pennsylvania, presently attended by the appellees Roger and Donna Schempp.

This action is brought under Title 28 § 1343 of the U. S. Code (28 U. S. C. A. § 1343) and was heard by a three-judge court pursuant to Title 28 § 2284 of the U. S. Code (28 U. S. C. A. § 2284).

The parent appellees complained on behalf of themselves as parents and as the natural guardians of Roger and Donna, their minor children. At the time of the filing of the action the older son, Ellory, formerly a plaintiff, was a student at the Abington Senior High School but graduated therefrom prior to trial. It is agreed that the application for an injunction is moot as to him.

The practice of reading The Bible in the public schools of Pennsylvania was, at the time suit was filed, made compulsory by section 1516 of the Public School Code of March 10, 1949, P. L. 30, as amended (24 PS § 15-1516) which read in full as follows:

> "At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That, where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.
>
> "If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."

After trial and decree as reported in 177 F. Supp. 398 [R. 177], and pending perfection of appellants' appeal from that decision, the statute was amended (December 17, 1959, P. L. 1928) to read in full as follows:

> "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

On October 24, 1960, this Court vacated the judgment of the District Court and remanded the case to the District Court for further proceedings in the light of the amendment to the original Bible reading statute.

On June 22, 1961, appellees obtained leave to file a supplemental complaint under Rule 15(d). The supplemental complaint consisted solely of the substitution in the complaint of the new citation and text of the amended statute in place of the former citation and text, and the elimination of paragraphs in the complaint relating to Ellory Schempp.

Appellant school district and intervenor appellant, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, thereafter filed an answer to the supplemental complaint.

After taking further testimony the District Court, on February 1, 1962, declared the amended statute unconstitutional, 201 F. Supp. 815 [R. 228] and issued a final decree enjoining appellants from carrying out the provisions of the statute. That decree has been stayed pending disposition by this Court.

Appellees contend that their rights under the Fourteenth Amendment are and have been violated and will continue to be violated unless this Court declares this statute unconstitutional and enjoins the appellant school district and appellant officers thereof from continuing to conduct the practices of which complaint is made.

(b) Statement of Facts.

The appellees Edward Lewis Schempp and Sidney Gerber Schempp are of the Unitarian faith and are members of

the Unitarian Church in Germantown, Philadelphia, Pennsylvania, which they regularly attend together with their three children, Ellory, Roger and Donna.

Ellory was 18 at the time of the original trial and had attended Roslyn Elementary School, Abington Township, the Abington Junior High School and the Abington Senior High School from which he had graduated in June of 1958.

Roger, who was 15 at the time of the trial, was an eighth-grade student in the Huntingdon Junior High School in Abington Township during the academic year previous to the trial, which was held during the summer recess.

Donna Schempp was 12 years old at the time of the trial and also a student at the Abington Junior High School and in the academic year preceding the trial had been in the seventh grade.

At the time of their second appearance at the hearing on the Amended Complaint both children were students at Abington High School.

All of the three children testified at the trial and their evidence discloses that it is the practice in the various schools of the Township which they had attended to observe the opening period of school on each day by a brief ceremony consisting of the reading of ten verses of the King James Version of the Bible, followed by a standing recitation in unison of that portion of the New Testament known in the Christian faith as "The Lord's Prayer",[1] and that generally the ceremony was followed by the familiar Pledge of Allegiance to the Flag, followed by routine school announcements.

Beyond this, however, the three children described a substantial number of variations in the manner and technique employed in the execution of this ceremony. In all of the schools which any of the three children had attended, except one, the Bible reading and the recitation of the prayer was conducted by the individual home room teacher, who either chose a text and read the ten verses herself or

1. Matthew 6:9.

delegated both choice of text and reading to the students, either in rotation or to volunteers [R. 10, 76, 79]. The only exception to these practices was recounted by Ellory Schempp, who stated that after the Senior High School had moved to a new building equipped with a public address system, the Bible was read over the loud speaker in each classroom following which the voice on the loud speaker directed the children to rise and repeat The Lord's Prayer [R. 11].

Ellory and Donna Schempp testified that during the reading of the Bible, a particularly high standard of physical deportment and attention was exacted and Donna testified that this deportment was not always required when other works were being read [R. 12, 81].

The three Schempp children and their father also testified as to the points of religious doctrine purveyed by the King James Version of the Bible which were contrary to the religious belief which they held and which the father and mother were teaching to their children, specifically, the divinity of Christ, the Immaculate Conception, an anthropomorphic God and the concept of the Trinity.

The father, Edward L. Schempp, pointed out that the manner of presentation, ten verses without comment, was that of a religious ceremony, the material being given a degree of authority and religious significance above normal school authority [R. 31]. In content, the father objected to material in the Old Testament regarding blood sacrifices, uncleanness, and leprosy, together with the whole concept of the Old Testament God which was contrary to the concept of deity which he endeavored to instill in his children. He testified that he did not want his children to acquire an image of Jehovah, the God of vengeance. He pointed out that in the very midst of the Ten Commandments was a verse asserting that God would visit the sins of the father upon the fourth generation—a particular verse he testified had been read in the Abington High School—and the witness went on to assert that this concept of God was in sharp contrast with the God of his own church and as taught in the Schempp family [R. 30-32].

Mr. Schempp also testified that there were innumerable bits of anecdotal material which were quite foreign to his concept of what is good, religious and moral, such as the injunction that one should not eat meat that dies of itself but that it may be fed to "the stranger within thy gates" [R. 32]. (Dr. Solomon Grayzel, who subsequently testified for the plaintiffs as an expert, pointed this out as an example of the unfortunate errors attendant upon ceremonial reading of The Bible without explanation, and stated that this passage meant only that it might be fed to those not governed by religious dietary laws) [R. 50].

Roger Schempp, the younger son, testified that he also attended a Unitarian Sunday school and sometimes church services with his family and that he believed that Christ was a great man but did not believe other things that the King James Version of The Bible asserted concerning Christ and the events of his life and did not believe in the divinity of Christ [R. 75-78].

Donna Schempp, a student in the seventh grade in Huntingdon Junior High School, likewise testified that she attended the Unitarian Sunday school and cited several points of religious belief contrary to that asserted by what she had heard read to her from the King James Version of the Bible in school. She also recounted the reaction of a Jewish friend and fellow student who objected to a reading of the portion of the New Testament. Donna said that she had never made any complaint about the reading of the Bible [R 79-85].

There is evidence in the record that the combined ceremony of Bible reading and the saying of the prayer was, on frequent occasions, although not uniformly, referred to by both students and teachers as the "morning devotions" [R. 22, 80].

Roger Schempp referred to the ceremony as "morning exercises"; counsel for the School District referred to the ceremony as "devotional services" or "devotional exercises" [R. 23-24, 76].

On behalf of the appellees, Dr. Solomon Grayzel, editor of the Jewish Publication Society, also testified. Dr. Grayzel, after graduation from the City College of New York and Columbia University, attended a Jewish theological seminary, was ordained a Rabbi and received a doctorate of Philosophy from the Dropsie College of Philadelphia, an institution of rabbinical, Semitic and Hebrew studies. The Jewish Publication Society, of which Dr. Grayzel is the editor, was the publisher of the "Holy Scriptures According to the Masoretic Text" and is presently engaged in a retranslation into English from the Hebrew. As part of the translation committee, Dr. Grayzel testified that he was familiar with the King James Version, the Revised Standard Version and both the Douay and the Knox Catholic Versions. Dr. Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures [R. 35-43].

Dr. Grayzel testified that from the standpoint of the Jewish faith, the entire New Testament and the concept of Jesus Christ as the Son of God was "practically blasphemous" [R. 44]. He cited at random incidents in the New Testament which were not only sectarian in nature but which tended to ridicule or scorn the Jews or, more particularly, the Jewish religious hierarchy, such as the address of Jesus in Matthew 23, in which the scribes and Pharisees are described as hypocrites [R. 52].

The witness also cited the famous scene portrayed in Matthew 27, in which the trial of Jesus before Pilate is described and in which, as related by the Christian New Testament, the Jews are portrayed as refusing to exchange Barabbas for the release of Jesus but insisting upon crucifixion in spite of the attempts of Pilate to placate the mob, the washing of the hands by Pilate, and then the verse 25; "Then answered all the people, and said, 'His blood be on us, and on our children' ", concerning which the witness

stated that that single verse had been the cause of more anti-Jewish riots throughout the ages than anything else in history [R. 52-53].

On the basis of his experience as a teacher of Jewish children in religious subjects, both in New York and in Gratz College, Philadelphia, Dr. Grayzel gave the opinion that such material from the New Testament, particularly that having to do with the trial and the crucifixion of Jesus, was capable of being explained to Jewish children in such a way as to do no harm but if merely read without explanation, it would be, and in his specific experience with children had been, psychologically harmful to the child and a divisive force within the social media of the school [R. 59].

Dr. Grayzel also acknowledged that there were excerpts from the New Testament which were not objectionable but when counsel for the School District suggested the story of the Good Samaritan,[2] as an example, the witness emphatically stated that the story was deliberately tampered with when inserted in the New Testament and that the Samaritan had been substituted for an Israelite as "a slap at the Jews of that day who refused to join the Christian church", since it was obvious that the characters of the original story would have been representatives of the divisions of the Jewish society of the time, namely, Priests, Levites and Israelites, and so told it would have had a certain moral teaching upon which Dr. Grayzel elucidated. As presented in the New Testament, Dr. Grayzel pointed out that the Christian child could well reproach the Jewish child with the cruelty of the people from whom the Jewish child was descended; that, therefore, such a story should not be read in public schools [R. 67-68].

In addition, there were specific instances in which the King James Old Testament had, in the view of the Jewish religion, been imbued with a Christological significance [R. 48].

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2. Luke 10:30.

Dr. Grayzel also explained that there was a significant difference in attitude with regard to the respective holy books of the Jewish and Christian religions in that Judaism attaches no special virtue to the reading of the Bible per se, that the Jewish Holy Scriptures are source materials to be studied, and the witness gave examples of confusion which had arisen in children's minds where passages of the Bible were read without benefit of explanation or comment [R. 49].

For the appellants, Orlando English, Superintendent of Schools of Abington Township, testified that a King James Version of the Bible was purchased by the School District and one copy issued to every teacher in the district. No other versions of the Bible or other religious work or text were ever purchased [R. 127].

All of the witnesses connected with the School District agreed that the method of selection of the verses for daily reading varied. In all of the schools, including Abington Senior High School, prior to the availability of the public address system, discretion as to selection and method of selection was left to the individual teacher, some of whom delegated this function to the students [R. 97].

According to the testimony of William Young, an English teacher at Abington Senior High School in charge of something known as the "radio and television workshop", a particular practice was followed in that school, under which the approximately 30 students of the radio and television workshop did the actual reading of the Bible and the leading of the school in the saying of The Lord's Prayer. Inasmuch as Mr. Young desired the students in this class to practice in advance the reading of whatever material was to be read by them over the microphone, he himself adopted a practice of sometimes having the students practice at home with their own Bibles, out of which they were to select a section, and consequently there had been occasion when the Jewish and the Catholic students had read from their Bibles which they had brought to school for the

purpose. Only the King James Version, however, was supplied by the school. Mr. Young did not say what the Jewish students did about The Lord's Prayer, it not being included in the Jewish Holy Scriptures [R. 108-122].

The principal of the Abington Senior High School, Dr. Eugene Stull, testified that there was in use in the school, supplied by the township school authorities, a roll book for the teachers' use in keeping attendance and marking the students and in the front of this book there were suggested texts for Bible reading. Whether or not these suggestions were followed was apparently up to the teacher. The book was not an official publication of the school district or of the state but was procured from a private publisher and neither Dr. Stull nor Dr. English knew how these verses were selected by the publisher or what verses they were [R. 105-106, 129-130].

The appellants likewise presented an expert witness, Dr. Luther A. Weigle, an ordained Lutheran minister, then holding a Congregational ministry in his capacity as Dean Emeritus of the Yale Divinity School.

Dr. Weigle testified at some length as to his experience and background in matters concerning theology, all of which was within the discipline of the Protestant sects. On the basis of this experience he testified that, although one of the outstanding issues of the Protestant Reformation was the feeling of Luther, Calvin and others that there must be a return to the original Hebrew text for a new translation of the Bible, the King James Version was not a sectarian work [R. 147]. It developed, however, under questioning by the Court that in Dr. Weigle's opinion, it would be a sectarian practice if the Hebrew Scriptures, in English, were read to the exclusion of other works; and it was the witness's opinion that this might not satisfy the requirement that "The Holy Bible" be read [R. 152-153]. Subsequently on cross-examination, the witness defined his statement that the Bible was "non-sectarian" as meaning non-

sectarian among the various Christian bodies with a caveat as to the Catholic Church [R. 161.]

Of the various Christian denominations, the witness disclaimed any particular knowledge of the Catholic viewpoint but pointed out that unlike the King James Version the Catholic church put in notes to any translations made and approved by them setting forth "what the authorized theology of the Church is with respect to that particular point" [R. 161].

On direct examination Dr. Weigle had testified at considerable length on the New Revised Standard Version of the Protestant Bible and his part in the work of translating and editing this book. He acknowledged that as late as 1952, shortly after its publication, there were organizations within the Protestant church who bitterly opposed the New Revised Standard Version and that there were public burnings of books of this version [R. 156-157].

Dr. Weigle stated that he thought there was educational value in reading the King James Version, both because of the moral teachings contained therein and the high literary value, but he acknowledged on cross-examination that such aspects were incidental when he endorsed the following statement from the book of which he was the author:

> "The message of the Bible is the central thing, its style is but an instrument for conveying the message. The Bible is not a mere historical document to be preserved. And it is more than a classic of English literature to be cherished and admired. The Bible contains the Word of God to man. And men need the Word of God in our time and hereafter as never before." [R. 164]

And he further stated that the reason that the Bible had moral, literary and historical values was "because people have believed it, because they believe that there is something revelatory in it of what true morals are. It is

simply a literary exercise but its literature has arisen out of that faith" [R. 166].

At the hearing on the amended complaint Mr. Schempp testified they had decided not to request that their children be excused from the morning devotions because, although they still felt that "the reading of the King James version of the Bible . . . was against our particular family religious beliefs", the price which would be exacted was that of having the children labeled as "odd balls" day after day for every day of the year [R. 214]. Mr. Schempp stated that he was concerned that classmates of Roger and Donna would so react and would tend to equate the religious difference or religious objection with atheism, which, in turn, has a number of unpopular connotations in the lexicon of the Abington community. Mr. Schempp felt that they were even likely to be equated with un-Americanism and immorality. He pointed out that the pledge of allegiance to the flag follows directly upon the recitation of the Lord's Prayer [R. 214, 216].

Mr. Schempp, in giving his reason for deciding not to request an excuse for his children, also pointed out that excuse from the morning devotions would also mean missing the daily announcements which, as he said, "are very important to a child" [R. 216].

He also testified that in Abington High School a common form of punishment is exclusion from the classroom and standing in the hall, and that excuse from the Bible reading would be undistinguishable in practice from such punishment and would carry the same stigma [R. 218]. Finally, Mr. Schempp testified that he felt these necessarily distinguishing actions would set apart his children from their classmates and "would be very detrimental to the psychological well-being of our children" [R. 217].

SUMMARY OF ARGUMENT.

As children and parents of children in the public schools of Pennsylvania the appellees have standing to challenge the constitutionality of the Pennsylvania statute requiring the reading of ten verses of the Holy Bible each day. The evidence is, as the District Court found, that this practice is a religious ceremony and, as such, violates the establishment portion of the religious clause of the First Amendment. In order to further the design of the Pennsylvania legislature, (as set forth in the Preamble of the Bible statute) to foster "a life of honorable thought" by teaching "lessons of morality" the state has employed religion as an engine of civil policy and has aided religion. The provision of the statute permitting children to be excused from the Morning Devotions is irrelevant to the transgression upon the establishment clause.

In addition, the evidence produced by both appellants and appellees establishes, as found by the District Court, that the only Holy Bible purchased and supplied by the state to all teachers, the King James Version, is a sectarian sacred work of certain sects of Protestantism. It is also not contested that the requirement of the language of the statute, which calls for the "Holy Bible" to be read, could only be satisfied by the sacred sectarian work of some particular religious sect. Thus the statute requires, and the practice as actually carried out in the schools constitutes, an aid to one religion over all others and a preference by the state in violation of both the establishment and free exercise clauses of the First Amendment.

Irrespective of the sectarian nature of the Holy Bible, the statute aids all religions. The First Amendment is not an "equal protection" clause among religions. The statute violates the establishment clause regardless of its excuse provision.

The appellees' constitutionally guaranteed rights to the free exercise of religion includes complete freedom to

shape and mold the religious orientation of their minor children. It is of record that much that is promulgated by the King James Version is contrary to the religious beliefs and teaching of the plaintiffs and some is personally offensive to them. In order to be free of interference by the state in the religious training of their children plaintiff parents are required, by the written excuse provision, to profess publicly a belief or disbelief and to label publicly and identify their children on each day of the school year as dissenters.

The statute interferes with the free exercise of religion. The excuse provision does not eliminate the operation of influence by the State because the statute requires that appellees take public action in order to exercise their right not to attend a religious ceremony. The effect of the statute is to compel a "profession of disbelief" by a parent who requests an excuse for his children. At the same time the statute exerts pressure upon children to attend the religious ceremony. The statute injects a religious prejudice into the school by singling out those who attend and those who dissent from attending the Bible reading ceremony.

The statute is therefore unconstitutional and the decree of the District Court should be affirmed.

ARGUMENT.

Point I.

The Practice Required by the Pennsylvania Statute Constitutes a Religious Ceremony or Observance.

The statute here involved necessarily provides for a reading of the Bible as a devotional or religious act; the ritual must be done each day and only at the prescribed time. Comment is expressly barred. The terms are mandatory.

Any contention that the Bible reading in question is required merely or even primarily for its literary, historic or moral value is belied by the terms of the statute itself and the practice under it. The statute requires the reading specifically of the "Holy" Bible, and enjoins any comment upon what is read. No other book or writing, of whatever historical or literary merit, has been so singled out and made a compulsory subject of reading by teachers in the schools of Pennsylvania. No other work is presented without comment; there is no provision for excusing a child from any pedagogical exercise.

Moreover, the reading is not confined to passages of recognized literary grace, nor is any effort required or made to select passages of particular historical or moral value, even assuming agreement could be reached on the identity of such passages. The fact that the reading must be without comment necessarily means that the pedagogical benefits, if there can be any when comment and discussion are forbidden, are relegated to an inconsequential role in comparison with the religious significance of the reading.

The record establishes that the form and atmosphere of the daily reading is not that of instruction or teaching of educational material. Rather, the proceedings are formal and ceremonial, with the children instructed to be especially attentive and respectful [R. 80-81]. The reading is part of

what are commonly called "Morning Devotions," and even counsel for the School District referred to it as "devotional services" [R. 23].

The School District's expert, Dr. Weigle, testified that the literary and historical aspects of the Bible are secondary to its inherently religious significance [R. 164]. The fact cannot be escaped that the Bible is essentially a religious work, and that its reading under these ritualistic circumstances is undeniably a religious exercise.

Appellees do not and need not contend that any version of the Bible or of any other major religious work is *incapable* of being used as pedagogical source material or is disqualified from any possible use in schools.[3] The contention is that it is not so used in the schools of Abington Township and was not intended by the legislature to be so used. This is plainly demonstrated by the fact that the Lord's Prayer, which clearly has no significance other than the religious one, is recited immediately after the Bible reading. Not only is the practice of mass compulsory recitation of the prayer unconstitutional in itself,[4] but the juxtaposition of this incantation following the Bible reading removes all doubts, if any there be, as to the religious character of the Bible reading.

The legislature has required, under criminal penalty, that all children in the Commonwealth attend school. It has provided that there must be each day a religious observance by teachers who face dismissal for failure to do so.[5] The law under attack, therefore, is one which estab-

3. The decree submitted by plaintiffs and adopted by the District Court expressly provides, "that nothing herein shall be construed as interfering with or prohibiting the use of any books or works as educational, source, or reference material; . . ." [R. 236].

4. There is no need for a separate provision in the decree with respect to the saying of The Lord's Prayer since it is a part of the Holy Bible and therefore within the terms of the Decree.

5. While the statute now provides no specific penalty in its own terms upon the teacher who refuses to observe its mandate, such a teacher can be dismissed for "wilful violation of the school laws." Public School Code of 1949, 24 PS § 11-1122.

lishes a mandatory religious ceremony with penalties for non-compliance.

Appellants argue that the Bible reading practice required by the statute does not require the performance of a religious act, and that listening to the reading does not constitute an "establishment of religion" within the meaning of the First Amendment (Appellants' brief, 29-31). Appellants attempt to distinguish listening to the reading of the Bible from the saying of an official prayer, held unconstitutional in *Engel v. Vitale*, 370 U. S. 421 (1962).

The attempted distinction is spurious. Whether the practice of Bible reading constitutes an "establishment of religion" certainly does not depend upon the listener's verbal participation in the practice. Certainly the official prayer in *Engel v. Vitale* would have been an "establishment of religion" had the prayers been required to be made by a teacher without any pupil participation. The listening pupil remains passive whether the teacher reads the Bible as here, or recites a prayer, or delivers a sermon. The listener's passivity in either case has not the slightest bearing on the nature of the ceremony.

Point II.

The Practice Required by the Statute Constitutes an Establishment of Religion in Violation of the Establishment Clause of the First Amendment.

The clause of the First Amendment dealing with religion is of dual thrust,—forbidding an establishment of religion and guaranteeing the free exercise of religion. Thus it is both a limitation upon the state and an affirmation of inviolate personal right.

Herein we treat of the establishment clause, bearing in mind that the written excuse provision of the Pennsylvania statute is irrelevant to this aspect of that statute's unconstitutionality.

The establishment clause of the First Amendment forbids not merely an established *church*; it forbids any law

"respecting an establishment of *religion.*" Whether its meaning and scope be fathomed by analysis of the literal words used, the stirring historical background of its adoption or review of the judicial precedents interpreting it, one must conclude that it forbids any interference, whether positive or negative, by the state in things religious. The state may neither hinder nor aid religion,—either any religion or all religions. For what the state may aid, it may hinder; what it may foster, however slightly or indirectly, it may impede grossly and directly. In short, the Amendment has been accepted as creating a wall of separation between church and state.

Appellees submit that *Engel v. Vitale*, 370 U. S. 421 (1962) controls this case. There this Court held that the action of state officials in requiring a prayer composed by them to be recited in the public schools at the beginning of each school day violated the prohibition of the First Amendment even though the prayer was denominationally neutral, and pupils who wished to do so were excused from the room while the prayer was being recited. In the language of Mr. Justice Black for the Court: "We think that the Constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government" (370 U. S. at 425).

Is it any more the business of government to require the reading of a prescribed number of verses from the sacred work of any religious sect as part of a ceremony opening each day's program in the public schools?

As in *Engel v. Vitale* the classrooms are used for conducting of this observance, the aegis and discipline of the state schools are employed to promulgate it, the children having been assembled to listen by the compulsion of the state's school attendance law and, finally, the state's employees, the teachers, supervise the proceedings.

There runs through appellants' argument the idea that a little ceremonial Bible reading is de minimus as an establishment. The Regents' Prayer in *Engel v. Vitale*, with its twenty-two words, was surely even lesser in magnitude, if such things can be measured. But this court said:

> "It is true that New York's establishment of its Regents' Prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:
>
> "'(I)t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?'" (370 U. S. at 436)

The application of the religious guaranty provision of the First Amendment in *Engel v. Vitale* required no extension of the "wall of separation" nor any departure from constitutional lines previously drawn by this court in a number of cases involving the public schools. Even without the guidance of *Engel v. Vitale* the District Court in the in-

stant case found *McCollum v. Board of Education* controlling (333 U. S. 203 (1948)).

In the *McCollum* case, a parent and taxpayer objected to a released time program in which religious instruction was given to public school children during school hours and on school premises; private teachers (required to be approved by the school authorities) presented this instruction in various classes arranged according to religious faith. Classes consisted of pupils whose parents signed cards requesting that their children be permitted to attend. The Court held the program unconstitutional as a violation of the principle of separation of church and state, repeating the classic summation of the "establishment" clause which it had laid down in *Everson v. Board of Education*, 330 U. S. 1 (1947):

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' " (330 U. S. at 15-16; 333 U. S. at 210-11)

In *Zorach v. Clauson*, 343 U. S. 306 (1952), a different type of released time program was upheld by the Court

(three Justices dissenting). There, the religious instruction was not given on public school premises, and it was presented by private teachers selected by the parents or churches of the children concerned; parents desiring to participate in the program merely notified the school authorities, and their children were released at designated times. The Court based its ruling on the differences between that program and the program in the *McCollum* case:

> "In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case." (343 U. S. at 315)

Appellants urge that the program in *McCollum* unlike the case here was invalid because the classrooms there were used to provide formal religious instruction involving indoctrination (Appellants' brief, 28). Irrespective however of the fact that the Bible reading is without comment, it is undeniably indoctrination in the religious ideas contained in the Bible. At least it is so intended, in order, as the preamble of the act states, to foster "good moral training" and "a life of honorable thought".[6] As in *McCollum*, classrooms are used for the instruction, the force of the public school is used to promote it, and in addition public school teachers, the State's representatives, directly supervise it using Bibles supplied by the school district from public funds, a circumstance not present in *McCollum*. We do not think that the sweep of the *McCollum* case was limited to the circumstance that sectarian teaching was undertaken. In any event, *Engel v. Vitale* makes it clear beyond question that the element of proselytizing is not a factor in determining whether violation of the "establishment" clause exists.

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6. Act of May 20, 1913, P. L. 226.

Appellants have invented and press an argument that what is required by the First Amendment is neutrality by "the government", which, in turn, means that the traditional religious leaven should remain undisturbed. The fact that it is the legislature of Pennsylvania which has not been neutral is apparently tacitly conceded, but the rejoinder is made that this non-neutrality is traditional. So was the segregation of students on the basis of race.

This is a curious and ingenious argument. Its initial fallacy is the equation of this Court with "the government." It blithely ignores the obvious fact that what these plaintiffs are complaining about is that "the government" in the person of the legislature of Pennsylvania has not observed the "neutrality towards religion" which appellants so rightly commend. In such a situation to urge this Court to be "neutral" by not interfering is to be oblivious to the very function of the judiciary and, because one branch of the government is induced to remain supine, the non-neutrality of the other is allowed to continue. This is neutrality with a vengeance!

In sum, appellants' argument here comes down to this: Bible reading in the schools has been a traditional religious practice over a long period of years. By not disturbing this practice the government's policy of neutrality toward religion will be preserved.

This is a plea for maintaining the status quo. It apparently assumes that governmental support of Bible reading in public schools would be objectionable were it not for the fact that such support has existed for a long time. Under this view, any long established practice in our public schools violative of church-state separation ought to be sanctioned if the effect of its removal would be a disturbance of the "religious leaven."

We find no support for abdication of judicial review of laws or customs having the sanction of law but honored by age alone. On the contrary, this court has not hesitated to review and declare invalid such laws where violative of

rights protected by the Fourteenth Amendment. The "separate but equal" doctrine adopted in *Plessy v. Ferguson*, 163 U. S. 537 (1896) was acknowledged as law in the field of public education from 1896 until 1954. In finding the doctrine invalid this court felt it necessary to "consider public education in the light of its full development and its present place in American life throughout the Nation": *Brown v. Board of Education*, 347 U. S. 483, 492-93.

In this same context appellants argue that if this statute is struck down a chain of public catastrophies will inevitably ensue such as discontinuance of chaplains for the armed forces, the elimination of the rubric on our coins, courtroom oaths and the official use of the Christian calendar.

The law knows well how to deal with such a relentless pursuit of logic. Some of these matters are de minimus and courts will have no hesitancy in saying so. As to most of them, it is difficult to see how any plaintiff would have legal standing to object.

Others, like chaplains in the armed forces, are subject to countervailing rights. In that case the right of one who by compulsion of the state is separated physically from access to his church to be provided with a substitute. If chaplains were not provided, the state, through its military service laws, would be preventing the free exercise of religion.

A. The Statute Aids and Prefers One Religion to All Others.

Christianity is the religion favored by this act to the exclusion of all other religions. More than this, a particular sect of Christians is preferred over other sects, for while the statute does not specify which version of the Bible shall be read, manifestly any book which can qualify as a "Holy Bible" is by definition a religious book of a particular Christian faith, creed or sect. And as the record in this

case eloquently shows, invariably the version of the Bible used, if not entirely clear from the statute, will be the one favored by the dominant sect in the community, or at least that favored by the predominant sect among the personnel of the school administration.[7]

In *Tudor v. Board of Education of Rutherford*, 14 N. J. 31, 100-A. 2d 857 (1953), cert. den., 348 U. S. 816 (1954), the Supreme Court of New Jersey condemned as violative of the Fourteenth Amendment a school board resolution permitting the distribution of Gideon Bibles of the King James Version. Chief Justice Vanderbilt for the court stated:

> "To permit the distribution of the King James version of the Bible in the public schools of this State would be to cast aside all the progress made in the United States and throughout New Jersey in the field of religious toleration and freedom." (14 N. J. at 52).[8]

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7. The superintendent of schools of Montgomery County, in which Abington Township is located, Dr. Allen C. Harman, also teaches at the Willow Grove Methodist Church. The four superintendents of schools in Philadelphia and adjacent suburban counties are all past or present Protestant church school teachers. *The Evening Bulletin*, col. 1, p. 52, October 9, 1962.

8. A number of other state courts have considered Bible reading in the public schools where the issue was usually confined to the question whether the use of the Bible was "sectarian" within the meaning of a provision in the State Constitution prohibiting sectarian teaching or giving preference to any religious sect:

a. Upheld where participation not directly compelled by law:

Nessle v. Hum, 1 Ohio, N. P. 140, 2 Ohio Dec. 60 (1894); *Stevenson v. Hanyon*, 7 Pa. Dist. 585 (1898); *Lewis v. Board of Education*, 157 Misc. 520, 285 N. Y. Supp. 164 (1935), modified and affirmed, 247 App. Div. 106, 286 N. Y. Supp. 174 (1936), appeal dismissed, 246 N. Y. 490, 12 N. E. 2d 172 (1937); *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N. W. 250 (1898); *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); in this case the court relied on the Fourteenth Amendment in holding children could not be required to attend reading against parents' wishes; *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N. W. 18 (1927);

The practice struck down in the *Tudor* case was far less objectionable. There was no reading of the Bible in the school, the distribution was carried out privately, upon individual request of parents, and without cost to the school system. Although care was taken to insure that the children were under no pressure to apply for a Bible, yet the court concluded there was coercion in fact.

The particular Holy Bible read in the schools of Abington Township and throughout the state of Pennsylvania and the only Bible purchased by the state and supplied to all teachers is the King James Version[9] which is the official

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Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895 (1922); *Moore v. Monroe*, 64 Iowa 367, 20 N. W. 475 (1884); *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S. W. 792 (1905); *State ex rel. Finger v. Weedman*, 55 S. D. 343, 226 N. W. 348 (1929), reading permitted but Catholic children allowed to absent themselves.

b. Upheld where legal compulsion present:

Church v. Bullock, 104 Tex. 1, 109 S. W. 115 (1908); *Spiller v. Inhabitants of Woburn*, 94 Mass. (12 Allen) 127 (1866); *Doremus v. Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), app. dism'd, 342 U. S. 429 (1952); *Carden v. Bland*, 199 Tenn. 665, 288 S. W. 2d 718 (1956). In the latter case plaintiffs also urged invalidity under the First and Fourteenth Amendments. *Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422 (1904); *Donahoe v. Richards*, 38 Me. 379 (1854).

c. Held unconstitutional where compulsory:

People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N. W. 846 (1902); *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915); Cf. *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 Pac. 35 (1918). Compulsory attendance at reading but not the Bible reading itself was held void in *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927).

d. Held unconstitutional where not compulsory:

People ex rel. Ring v. Board of Education, supra, note; *State ex rel. Weiss v. District Board, supra*, note; *Herold v. Parish Board, supra*, note.

9. [R. 127]. The fact that under an innovation of one teacher some students may occasionally use other versions does not, of course,

Bible of certain of the Protestant sects of the Christian religion. It is a sectarian religious work, both in purpose and content. Its dedication is anti-Catholic[10] [R. 162]; it has been called by the Catholic Church the "chief arm of the Protestant revolt".[11] The New Testament, known to Protestants as the Gospel, was written as, and for 1900 years has been, the principal vehicle for the promulgation of the Christian religion and it is, therefore, as sectarian vis-a-vis Judaism as it is possible for a religious work to be. Mere changes in language in the Revised Standard Version have within the decade led to public burnings of the new translation [R. 157].

The record contains considerable material excerpted from Encyclicals of the Popes and the Canons of the Roman Catholic church. Pope Leo XII labeled the Protestant version as a perversion and warned that the very practice followed in Abington (and according to the testimony of State Superintendent Boehm, throughout the Commonwealth), that of "*indiscriminate*" Bible reading may do "more harm than good". Pius IX asserted that the Protestant vernacular translations were filled with error and false explanations and degraded the Sacred Book "by using it as an instrument of proselytism". Naturally no more fertile field for proselytism could be found than the public schools. Whether, in fact, the Protestant Bible was selected for such purposes is immaterial if, in fact, the Catholics so believe. It was just such occasions for divi-

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make the practice any less sectarian, for the listening children of other faiths must then be attentive to the reader's particular version [R. 109-112].

10. The translators' dedicatory preface states that the purpose of the translation was to give "such a blow unto that Man of Sin [the Pope] as will not be healed" and "to make God's holy truth to be yet more and more known to the people, whom they ['Papist persons at home or abroad'] desire still to be kept in ignorance and darkness."

11. *A Catholic Commentary on Holy Scripture* (imprimatur and nihil obstat), London, 1953, p. 11.

sive recrimination that the First Amendment was designed to avoid. The very practice of reading the Bible—"without comment" has been vigorously condemned by Catholic authority which has decreed, "Believing herself to be the divinely appointed custodian and interpreter of Holy Writ, she cannot without turning traitor to herself approve the distribution of Scripture 'without note or comment' ". The same authority has asserted that the "impelling motive" of those who distribute such Bibles is their knowlege that "Private interpretation of the Scriptures" is a "fundamental fallacy".[12] The most disgraceful and violent episode in Philadelphia's religious history arose over what version of the Bible was to be read in the public schools.[13]

The record contains considerable material[14] delineating the difference in content and concept of the King James Version as compared to the Douay (Catholic) version and the Jewish Holy Scriptures.[14] Furthermore, the leading faiths differ not only in their translation and interpretation of particular Biblical passages, and as to the books which together constitute their "Bible", they also differ in their

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12. *The Catholic Encyclopedia*, Robert Appleton Company, New York 1907, vol. 2, p. 545.

13. In 1844 took place the infamous Nativist Riots in Philadelphia. Within the shadow of the site where stands the courthouse in which the instant case was heard, Catholic churches were burned and at least ten persons killed. The trigger of this episode was a controversy over the reading of the King James Version of The Bible to Catholic children in the public schools. Bishop Kenrick had protested and asked for equal treatment. The Native American Party, forerunner of the Know-Nothings, seized upon this protest as evidence of a Popish Plot to oust the King James Bible from the schools. Hailing The Bible as the source of all morality, "Friends of The Bible" committees were set up to oppose "naturalized and unnaturalized foreigners" who wanted to "eject it therefrom." The bloodshed followed. *Irish Emigrant and American Nativism*, Berger, Pennsylvania Magazine (1946); O'Gorman, *History of the Roman Catholic Church in the United States*, New York (1895).

14. See particularly the testimony of Dr. Solomon Grayzel, Editor of the Jewish Publication Society, and of Dr. Luther A. Weigle, Dean Emeritus of the Yale Divinity School [R. 41-74, R. 142-169].

views as to the Bible's essential character. For the Jews the Bible (i.e., the Old Testament) is a record of a covenant between God and Abraham and the latter's descendants, the children of Israel: to them the New Testament is not "sacred" literature [R. 43], in fact the concept of the divinity of Christ is blasphemous [R. 44]. For Catholics the Bible is a church document whose meaning the Church reserves the exclusive right to interpret.[15] For Protestants, while the essence of the Bible is the New Testament, each denomination reserves the right to interpret it to fit its own particular beliefs and practices,[16] and this reservation has led to exceedingly bitter controversy in this century.

The concept of an anthropomorphic God, the concept of a God of vengeance, the doctrine of the Trinity, the doctrines of the Virgin Birth, the divinity of Christ, the transfiguration, the miracles,—all these *religious* beliefs are contrary to the religious beliefs of the appellees, both parents and children. In a religiously free society, the Schempp parents should not be put to contradicting in the home what their children are subjected to in the school.

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15. Catholics hold that: "The Bible, as the inspired record of revelation, contains the word of God; that is, it contains those revealed truths which the Holy Ghost wishes to be transmitted in writing." and further, that "though the inspiration of any writer and the sacred character of his work be antecedent to its recognition by the Church yet we are dependent upon the Church for our knowledge of the existence of this inspiration. She is the appointed witness and guardian of revelation. From her alone we know what books belong to the Bible." *The Catholic Encyclopedia*, Robert Appleton Company, New York 1907, vol. 2, p. 543.

16. Many Protestant denominations appeal to the Bible to justify their own sectarian beliefs. Examples of this are too numerous to recite here but the point is illustrated by the following: The Latter Day Saints, according to an authoritative pronouncement, believe in universal "salvation". See Richard L. Evans, "What is a Mormon?", in *A Guide to the Religions of America*, ed. Leo Rosten, New York 1955, p. 95. On the other hand, the Jehovah's Witnesses say that "The reward of Spiritual life with Christ Jesus in heaven for men on earth is limited to those who inherit the Kingdom of God. In Revelation 7:4, the number of these is given as exactly 144,000." See Milton G. Henschel, "Who Are Jehovah's Witnesses?", in *A Guide to the Religions of America, Ibid.*, at p. 61.

The Schempps ask no more than that which one would suppose they were entitled to as citizens of the United States: the right to form and mold and guide the spiritual life of their own children themselves without interference or "help" from the State, however well-intentioned.

To brush aside these differences in belief as mere quibbles is, to say the least, an extraordinary rewriting of the records of centuries of religious conflict and bloodshed. To treat them this lightly is to denigrate the value of specific religious belief. The result is to foster a kind of colorless national, or public school creed, a religiosity without religion, a sanctimonious eclecticism cut adrift from theology.[17]

The characterization of the Holy Bible of any religion as "non-sectarian" is, of course, almost inevitable on the part of the hierarchy of that particular church or religion. All religions claim universality; all believe, and must believe, that their truth is truth and that the "truth" of other religions is, at best, error. Likewise, the writings or sacred texts upon which the religion founds its particular beliefs, if admitted by the adherents of the religion to be "sectarian" are thus conceded to be less than fundamental and universal in origin and application, or at least, sug-

17. "There is an inclination in educational circles particularly to develop a kind of common, national, public-school creed which rigidly excludes any theological concern as divisive and dangerous to 'democratic unity'. Such a point of view is naturally offensive to the believer, for it misunderstands the necessarily transcendent and all-encompassing relevance of his beliefs.

* * *

When men feel compelled to subscribe to religious affirmations they do not truly accept, the civil liberties problem is plain enough. Failure on the religious side is important too. The kind of religion that results from this common civic faith is a religion-in-general, superficial and syncretistic, destructive of the profounder elements of faith. Part of what drops away is the note of judgment and, more broadly, the whole transcendent dimension of religious truth." William Lee Miller, *Religion in the American Way of Life*, Fund for the Republic (1958), pp. 13, 14.

gest that the faith in question is but one of many competing and co-equal religions.[18]

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18. No better summation of the case against the claimed nonsectarianism of The Bible can be stated than the one contained in *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910). In that case Catholic parents complained that their children were compelled to attend public school where the King James Version of The Bible was read. The court in holding the practice invalid as sectarian instruction within the meaning of the Illinois Constitution said:

> "Christianity is a religion. The Catholic church and the various Protestant churches are sects of that religion. These two versions of the Scriptures are the bases of the religion of the respective sects. Protestants will not accept the Douay Bible as representing the inspired word of God. As to them it is a sectarian book containing errors, and matter which is not entitled to their respect as a part of the Scriptures. It is consistent with the Catholic faith but not the Protestant. Conversely, Catholics will not accept King James' version. As to them it is a sectarian book inconsistent in many particulars with their faith, teaching what they do not believe. The differences may seem to many so slight as to be immaterial, yet Protestants are not found to be more willing to have the Douay Bible read as a regular exercise in the schools to which they are required to send their children, than are Catholics to have the King James' version read in schools which their children must attend. (pp. 344-345)
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> "The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it. The Bible has its place in the school, if it is read there at all, as the living word of God, entitled to honor and reverence. Its words are entitled to be received as authoritative and final. The reading or hearing of such words cannot fail to impress deeply the pupil's minds. It is intended and ought to so impress them. They cannot hear the Scriptures read without being instructed as to the divinity of Jesus Christ, the Trinity, the resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects do not agree. Granting that instruction on these subjects is desirable, yet the sects do not agree on what instruction shall be given. Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrine of one or more of them. The petitioners are Catholics. They are com-

The testimony of Dr. Weigle, although he was called as a witness for the defendant School District, well illustrates this point. As an ordained Lutheran minister, it is not surprising that he felt that the King James Version was non-sectarian (which he later amended to non-sectarian within the Christian religion and further qualified this by saying that he was not a Catholic and could not speak for the Catholic Church), but asserted that the reading of the Jewish Holy Scriptures would be "a sectarian practice" [R. 150, 153, 161].

A practice of having a religious ceremony which consists solely of the reading of a Bible and or the mass recitation of the Lord's Prayer is sectarian in a further sense.

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pelled by law to contribute to the maintenance of this school and are compelled to send their children to it, or, besides contributing to its maintenance, to pay the additional expense of sending their children to another school. What right have the teachers of the school to teach those children religious doctrine different from that which they are taught by their parents? Why should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their Church and use the Lord's Prayer as taught by another sect? If Catholic children may be compelled to read the King James' version of the Bible in schools taught by Protestant teachers, the same law will authorize Catholic teachers to compel Protestant children to read the Catholic version. The same law which subjects Catholic children to Protestant domination in school districts which are controlled by Protestant influences will subject the children of Protestants to Catholic control where the Catholics predominate. In one part of the state the King James' version of the Bible may be read in the public schools, in another the Douay Bible, while in school districts where the sects are somewhat evenly divided, a religious contest may be expected at each election of school director to determine which sect shall prevail in the school. Our Constitution has wisely provided against any such contest by excluding sectarian instruction altogether from the school. (pp. 346-347)

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". . . The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion. It is not adapted for use as a text book for the teaching, alone, of reading, of history, or of literature, without regard to its religious character.". (p. 348)

Regardless of the content of the particular Bible which might be read, the practice is a reflection of a concept of bibliolatry (sometimes called monobiblicism) characteristic of the fundamentalist Protestant faiths. Neither the Jewish nor the Catholic faiths, nor the Unitarians or Society of Friends[19] or other such Protestant dissenters, emphasize Bible reading per se without study, comment, discussion or elucidation. In fact, distinguished Catholic authority specifically charges the concept of monobiblicism to Calvin and ascribes to this practice great significance in the strategy of the Reformation.[20] And the saying of a prayer, with or without Bible reading, is sectarian regardless of content, at least under the method of mass recitation employed in the schools, since it embodies both a belief in the significance and exercise of petitional prayer, and the concept of direct access of the individual to an immanent God, neither of which are by any means universally accepted by all religions or individuals.

If this statute can be upheld it would be as justifiable and consistent, for example, for the Mormons (Latter Day Saints), in areas where they predominate, to insist that the Book of Mormon, which they regard as inspired by God, be read in public schools; or for Christian Scientists to insist that Mary Baker Eddy's "Science and Health with Key to the Scriptures", which they regard as inspired, to be read; or for Swedenborgians (New Church) to insist upon the reading of writings of Emanuel Swedenborg, such as "Arcana Celestia" or "Heaven and Hell"; or for fol-

19. "Nevertheless because they are only a declaration of the fountain, and not the fountain itself, therefore they are not to be esteemed the principal ground of all truth and knowledge, nor yet the adequate primary rule of faith and manners." Robert Barclay, The Confession of the Society of Friends, Commonly called Quakers, A. D. 1675 (*Barclay's Apology*), Third Proposition: Concerning the Scriptures.

20. Dom Bernard Orchard, Rev. Edmund Sutcliffe; Rev. Reginald C. Fuller, Dom Ralph Russell, editorial committee, A Catholic Commentary on Holy Scripture, p. 11 (with imprimatur and nihil obstat), London, 1953.

lowers of Eastern Religions, of which there are many in this country (and who constitute a majority in Hawaii), to insist upon the reading of the holy books of the East such as the Confucian classics, the Buddha Scriptures and the Koran.[21] Today in this country there are at least 254 religious sects or denominations, including many non-Christian groups.[22] Under the U. S. Constitution there is or should be no difference in the principles applicable to a small minority religious group and to a large dominant religious group. The First Amendment does not select any group or type of religion for preferred treatment: *United States v. Ballard*, 322 U. S. 78, 87 (1944).

The appellants seek to meet the inherently preferential aspect of the practice under the statute by insisting upon the absence of proselytizing or indoctrination which they say follows from the "without comment" proviso. This is wrong in theory and in fact,—in theory because proselytizing is not an essential ingredient of constitutional infirmity; in fact because, as their own expert testified, the Bible is the message of God to man and the New Testament the message of Christianity. No book in all history has demonstrated a more powerful ability to indoctrinate.

B. The Statute Aids All Religions.

We have stated at considerable length our reasons for contending this statute bad as giving a clear preference to

21. The I AM cult (which has a temple in Philadelphia and members throughout the area), the conviction of whose leaders for mail fraud was reversed in *United States v. Ballard*, 322 U. S. 78, 87 (1944), would insist upon the reading of the literature written by Guy and Edna Ballard which they regard as inspired by certain celestial "ascendant masters" and delivered to the Ballards by the divine messenger, St. Germain. Although characterized as "humbug" by this Court, this cult was accorded the protection of a religion under the First Amendment.

22. According to the Yearbook of the American Churches in 1961 (National Council of Churches, 297 4th Avenue, New York), there is a total church membership of 112,226,905 persons in the United States divided into 254 bodies, including Buddhist, Eastern churches, Jewish, Roman Catholic and Protestant.

one religion. We do not however mean to suggest that its ailment would be remedied in the least degree if the words "Holy Bible" were interpreted to include only the books thereof acceptable to the Jews or if the various versions currently used by Protestants and Catholics were in some fashion made available for use in public schools without discrimination, nor indeed would it vary the case one bit if this statute were widened to include the "holy" books of every religious group that claims adherents in the United States today; this Court has made clear beyond quibble that the state may not "aid all religions" any more than it may prefer one over another.

This Court's classic declaration in the *Everson* case was the fruit of long and careful historical research into the evolution and meaning of the religion clause of the Amendment and its announcement has since become the most authoritative exposition of that meaning. Within a year after the *Everson* decision was handed down, the Court was called upon in the *McCollum* case to repudiate this interpretation of the First Amendment, and this the Court refused to do. On the contrary, it went out of its way to repeat in full the detailed meaning of the Amendment set forth in the *Everson* case. It reaffirmed that interpretation and held the Illinois released time program unconstitutional, expressly stating that it made no difference that the aid was non-preferential and non-discriminatory. Again in *Zorach v. Clauson, supra*, this Court reaffirmed its adherence to this view, unambiguously stating that "government cannot finance religious groups" whether preferentially or otherwise. Finally, there is recent reaffirmance in *Engel v. Vitale.*

The First Amendment is thus not an "equal protection" clause among religions; it was framed to meet the demands of the states for an express and absolute prohibition against government power to deal with religion in any form or manner. To uphold such a statute as the present one would be to run directly in the face of the

constitutional prohibition, and to ignore the clear, unequivocal expressions of the Supreme Court in *Everson*, *McCollum*, and *Engel*.

Perhaps none of the provisions of the Bill of Rights are so illuminated by study of the immediate history behind their adoption as the clause which is involved in this case. We refer to the fight against the Assessment Bill in the legislature of Virginia during 1784 and 1785. This bill was designed to support religion in general; each taxpayer having the privilege of selecting the church which should receive his share of the tax *or*, if he preferred, his share could be designated by him for education. Thus there was neither overt preference for one sect over another nor enforced contribution to some church since the tax could be used for secular purposes.

However, Madison and Jefferson fought the Assessment Bill, were ultimately successful and, in the succeeding legislature, there was passed Jefferson's Bill for Establishing Religious Freedom. As part of the fight against the Assessment Bill, Madison published one of the great landmarks in the history of human freedom,—the famous *Memorial and Remonstrance*.

A complete and definitive discussion of the history of the religious clause of the First Amendment and the role of Madison and Jefferson is set forth in Justice Rutledge's fifty-seven page dissent in the *Everson* case. It is pointless here to reproduce the material contained there and summary fails to do justice to it. The full text of the Remonstrance, together with the text of the Assessment Bill itself, is printed as an appendix to that opinion. In view of Madison's subsequent draftsmanship of the religious clause of the First Amendment, the Remonstrance is more than an historical curiosity; it declares the very basis of policy upon which, a few years later, the First Amendment clause was founded.

Madison's position was that religion is wholly exempt from the cognizance of civil society and hence beyond the

power of the legislature to treat in any way—by aid or hindrance, large or small. The fact that the Bill was non-discriminatory and non-sectarian, and even the fact that in default of a designated religion the tax was destined for secular education did not eliminate the fact that the state intended to "employ Religion as an engine of civil policy."

The preamble of the Assessment Bill stated the purposes of the Bill to be that the general diffusion of religion "hath a natural tendency to correct the morals of men, restrain their vices and preserve the peace of society". Madison made the point that true as this might be, the state was not to employ religion for these or other civil ends.

The preamble to the act under attack in this case is strikingly similar:

> "Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizen ship, that the public school children should have lessons of morality brought to their attention during their school-days; . . ."[23]

Thus after almost 200 years the legislature of Pennsylvania falls into the precise error that Madison and Jefferson were able to persuade the Virginia legislature to avoid.

But now that the amendment permitting excuse has been added to the statute the similarity between the Assessment Bill generally and the Pennsylvania Bible reading statute becomes ever more marked. The Assessment Bill in its final form, and the form in which it was defeated, provided that those citizens who did not care to have their tax earmarked for a particular religion could designate the tax to be used for secular education purposes. The Bill was therefore what counsel for the School District would insist upon calling a "permissive" assessment.

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23. Act of May 20, 1913, P. L. 226.

Everyone was going to be taxed and those who objected to the religious use of the tax would be permitted to avoid participation in the support of religion, just as in the amended statute, the Morning Devotions are going to take place, but provision is made for avoidance of participation in them.

This feature should no more serve to save the instant statute than it did the Assessment Bill. Madison went to the heart of the matter when he argued that this was state aid of religion and hence an establishment whether it forced support from a given citizen or not.

Point III.

The Statute Interferes With the Free Exercise of Religion.

Appellees submit that the statute violates the free exercise clause of the First Amendment because it requires that they and their children take public action in order to exercise the freedom of religion or non-religion which the Constitution guarantees to them.

Regardless of the nature of this public action, regardless of whether the consequences are pleasant or unpleasant, the action itself,—the communication to the state authorities is an act of profession of belief or disbelief and it is, per se, a violation of the First Amendment to exact it.

We have adverted to the famous statement of the meaning of the religious clause of the First Amendment as superbly put in *Everson v. Board of Education*, 330 U. S. 1 (1947). The Court said there:

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . Neither a State nor the Federal Government . . . can force . . . a person . . . *to profess a belief or disbelief in any religion* . . ." (330 U. S. at 15)

The legislature has now contrived a device which requires the plaintiffs in order to avoid exposure to religious material contrary to the family beliefs of plaintiffs to "profess a belief or disbelief" in a religion.

Plainly the excuse, followed by the excusing, is precisely this. It says to the state authority and to all the world, "I and my children do not believe in the religion promulgated by the Holy Bible".

This is precisely a "profession of disbelief" which the Supreme Court has said the state may not exact.

This statute violates the doctrine of the Everson case totally aside from whether or not other consequences are such as to constitute an inherent penalty for the profession. But there are manifestly such consequences. The action required is such as to mark and set aside from the rest of the students those who desire not to participate in a religious ceremony. The appellee Mr. Schempp testified that he was concerned lest his children be regarded as "odd balls" if they were excused from the morning ceremonies [R. 214]. This is surely a most reasonable apprehension; a view which ignored this fact would be one that ignores reality and the forces of social suasion.

As appellee Schempp testified, few are the children who would distinguish between religious dissent and irreligiousness [R. 214]. It is self-evident, and is a matter of concern to Mr. Schempp, that this is a day when children old enough to be exposed to mass media are told constantly that the epic struggle of all Western civilization is now pitched between the God-fearing West and the atheistic Communists. This side-effect is heightened by the fact that whatever arrangements are made for excusing a child, he would necessarily also be excused from the pledge of allegience to the flag, thus further confusing his classmates as to what it is the child dissents from.

Again, though it may not loom large in the spectrum of the issues here involved, it would appear from the record that unless the excused child remained just outside the threshold of the classroom (as if it were being punished) so as to be ready to enter the room as soon as the Lord's Prayer had ended, the child would also miss the daily announcement [R. 217-218]. No child likes always to be the one in its class that never gets the word.

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend": *McCollum v. Board of Education, supra*, 333 U. S. at 227 (Concurring opinion of Mr. Justice Frankfurter).

Appellants argue that no request by these parents to have their children excused has been received, hence there is no compulsion. The argument rests on the assumption that all persons have the courage of their convictions and will act accordingly even though their action may give offense to their neighbors or to a majority of citizens in their community. Again the argument ignores reality and the forces of social suasion. The District Court pointed out its fallacy when appellants first made it: "Indeed the lack of protest may itself attest to the success and the subtlety of the compulsion": *Schempp v. School District of Abington Township*, 177 F. Supp. at 407 [R. 192].

Indeed the requirement that a parent take affirmative action to disassociate himself from the group by requesting an excuse is a greater pressure than in the *McCollum* case where affirmative action was required for association. Moreover, a mandatory requirement of school attendance for every child of school age under criminal penalties imposed on parents or other persons in loco parentis puts both parents and children in the path of the compulsion.

The grounds for rejecting any so-called "voluntary" scheme of Bible reading in public schools for those who choose to attend such reading have been well stated in a number of decisions by state courts of last resort.[24]

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24. *Herold v. Parish Board of School Directors*, 136 La. 1034, 1050, 68 So. 116, 121 (1915):

"And excusing such children on religious grounds, although the number excused might be very small, would be a distinct

The separation of the child from his fellows for observance of a religious exercise based on the preference of the parent tends to have a detrimental effect on the child. For the child is torn between an impulse to obey the parents' wishes and the pressure to conform to his group. If the child yields to this pressure, the result is disobedience, a loss of respect for the parent and interference with the parent's right to control in matters of religion. On the other hand, if the child obeys the parent, he suffers a loss of standing in his group.

Hence, this act makes possible a divisive controversy over a religious observance between the parent and the child, between the child and his fellows, between the parent and the school or between the parent who disapproves and

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preference in favor of the religious beliefs of the majority and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done."

State ex rel. Weiss v. District Board, 76 Wis. 177, 199-200, 44 N. W. 967, 975 (1890):

"When . . . a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others."

People ex rel. Ring v. Board of Education, 245 Ill. 334, 351, 92 N. E. 251, 256 (1910):

"The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

those parents who approve of the law. The result is an injection of religious prejudice tending to subvert the unity basic to an educational system which professes to train good citizens how to live together in a pluralistic society. Discrimination, whether based on religious belief or on race or color, destroys equality in public education.

It is this singling out, this identification, this distinguishing between who believes and who dissents, which is at the root of the prescription that the state may not require a profession of belief or disbelief in any religion.

CONCLUSION.

The American solution of a religiously pluralistic society is unique. It is not the solution of secularism: observers of the American scene from de Tocqueville to the most recent Gallup poll remark upon the high proportion of church membership and attendance. This solution has avoided the anti-clericalism and aggressive secularism which has generally characterized Western European societies. The tradition is not merely the Judeo-Christian tradition insulated and diluted with the secular humanism of rationalist enlightment of the 18th Century. Nor is it quite this rationalism with its secular humanism infused with religion. For inherent in it is the concept of the state of *limited* authority and concerns, a state which is a means, not an end, and which does not assert itself as being the *Whole*.

The wall of separation doctrine implies not antagonism to religion, on the contrary it is the apotheosis of deference by Caesar to God, for it places such matters utterly beyond the ambit of civil power.

> "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality . . . The philosophy is that if government interferes in matters spiritual, it will be a divisive force." *Engel v. Vitale*, 370 U. S. at 443, concurring opinion of Mr. Justice Douglas.

The Pennsylvania statute and the practice under it is unconstitutional.

The judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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